

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PASQUALINO and CARMELLA	:	CIVIL ACTION
LEPORACE, husband and wife,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.,	:	
	:	
Defendants.	:	NO. 96-6363

MEMORANDUM

Reed, J.

June 9, 1998

Plaintiffs Pasqualino Leporace and Carmella Leporace, husband and wife, brought this action against defendants police officers Henry Lewis, David Merrick, and ten unnamed police officers as well as the City of Philadelphia. Plaintiffs allege violations of their constitutional rights under 42 U.S.C. § 1983 ("Section 1983") for false arrest and use of excessive force, as well as state law claims for assault and battery, false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress and outrageous conduct.

This Court has original jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

Pending currently before the Court is the motion of defendants for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) (Document No. 20), and the response of plaintiffs thereto. For the following reasons, the motion will granted with respect to the federal claims and the state law claims will be dismissed without prejudice.

I. FACTS¹

Most of the underlying facts of this case are not in dispute. I will note where the parties recount the incident differently.

Mr. Leporace was the owner of the Blue Cave Restaurant located in the Germantown area of Philadelphia, Pennsylvania. On September 27, 1994, Mr. Leporace was working at the grill in his restaurant. A carpenter named Richard Steadman was working on the building installing a rear door. At approximately 2:30 p.m., Mr. Leporace heard and was told about a disturbance taking place outside the restaurant between Steadman and an African-American female. As Steadman was working on the door, the female twice approached him and grabbed his penis and buttocks. (Def. Ex. D). Steadman pushed her away and she grabbed his shirt and started punching him. (Def. Ex. D); (Statement of Steadman at 2 of Def. Ex. F). Patrons in the restaurant informed Mr. Leporace that Rick had been assaulted. (Dep. of Leporace at 26-27). Mr. Leporace went out to the area where Rick was working and saw the female trying to hit Rick with a two-by-four and then with a beer bottle. (Dep. of Leporace at 26-27). When Mr. Leporace tried to intervene, the female attacked him, knocked him to the ground and spit on him. (Dep. of Leporace at 27). After the attack, Mr. Leporace went inside the restaurant to wash himself. (Dep. of Leporace at 27). At this point a large crowd had gathered.

After Mr. Leporace returned to the restaurant, an unknown African-American male approached the female and told her to go home. (Police Interrogation of Steadman - Def. Ex. D). She told him to mind his “fucking business.” (Police Interrogation of Steadman - Def.

¹ The facts stated herein are taken mostly from the depositions and statements submitted by the parties.

Ex. D). The male then took a piece of wood from the trash and hit the female in the face. (Police Interrogation of Steadman - Def. Ex. D). The male also punched her. (Statement of Steadman at 3 of Def. Ex. F). The male then drove-off in his car. The female then started to come toward Steadman again.

Soon thereafter, police officers Lewis and Merrick arrived on the scene. Officers Lewis and Merrick had been assigned to school dismissal at a nearby high school when they received a radio call from the police dispatcher about a person screaming at the location of Mr. Leporace's restaurant. Also, around the same time, the officers were advised by students that there was a fight at that location. When they arrived at the restaurant, there were numerous people, approximately fifteen,² outside. (Dep. of Lewis at 23). They observed the female standing in the street bleeding from the face and ear, with blood on her shirt, and screaming frantically. (Dep. of Merrick at 7); (Dep. of Lewis at 22). She was screaming that Mr. Leporace and another male beat her up. (Dep. of Merrick at 7); (Dep. of Lewis at 23). She named Mr. Leporace by name and pointed to him. (Dep. of Merrick at 7); (Dep. of Lewis at 23); (Statement of Reverend Doreen Williams at 2 of Def. Ex. F); (Statement of Thomas Jones at 1 of Def. Ex. F); (Statement of Steadman at 4 of Def. Ex. F).

Dawn McCoy, an employee of the restaurant, recalls the incident only slightly differently. McCoy avers that when the officers arrived and asked the female what happened, she replied, "He hit me. He hit me," but the female never gave a name at that time. (Statement of McCoy at 2 of Def. Ex. F). McCoy stated that the police officer asked the female whether the

² Steadman estimated that 80 people were outside when the police arrived. (Statement of Steadman at 4 of Def. Ex. F).

man who hit her was the man who owned the store, and then the female responded yes and named Mr. Leporace. (Statement of McCoy at 2 of Def. Ex. F).

Upon being informed that Mr. Leporace hit the female, Officer Lewis approached Mr. Leporace, who was standing outside of the restaurant and told him that he would have to go the detectives' office to explain his side of the story. (Dep. of Lewis at 48). Officer Lewis reached for Mr. Leporace's arm, but Mr. Leporace pulled away and stated that he was not going anywhere. (Dep. of Lewis at 48-49). Mr. Leporace then walked to the front of his restaurant and Officer Lewis followed and explained again to Mr. Leporace that he had to go to the detectives and that it was not voluntary. (Dep. of Lewis at 49). According to Officer Lewis, Mr. Leporace then *ran* into the restaurant and out the back of the building onto the street. Officer Lewis chased after him and yelled to other officers, who grabbed and cuffed Mr. Leporace. (Dep. of Lewis at 49). Mr. Leporace was placed in a police wagon.

Mr. Leporace testified that, after officer Lewis told him he was under arrest, Mr. Leporace told Officer Lewis to come to the back of the restaurant to speak with Steadman who could explain what happened and that Mr. Leporace was not involved. (Dep. of Leporace at 31-32, 34). According to Leporace, he walked (not ran) to the back of the store. (Dep. of Leporace at 35, 37)

People at the scene informed the police officers that Mr. Leporace was being wrongfully accused and that he did not hit the female. (Dep. of Lewis at 25-26, 122 (stating that onlookers were saying that Mr. Leporace did not do it and to leave him alone)); (Dep. of Merrick at 8-10, 18, 28 (stating that the reverend at scene, as well as Steadman and a mechanic from across the street informed officer Merrick that Mr. Leporace did not touch the female)). Officer

Merrick also stated that the female later told him that a black man in a brown car hit her, but that Mr. Leporace gave that man the stick. (Dep. of Merrick at 28).

The officers informed the bystanders to go to the North Detective Division to explain their story. Once at North Detective Division, a detective conducted an investigation. Mr. Leporace was released without charges.

Mr. Leporace and his wife filed a complaint against the City of Philadelphia and the various police officers on September 18, 1996. On March 3, 1997, plaintiffs filed an Amended Complaint alleging federal claims as well as related state law claims seeking recovery for physical and emotional injuries, pain and suffering, embarrassment, and medical expenses.

II. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(c), summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

The district court is required, in resolving a motion for summary judgment, to determine whether “the evidence is such that a reasonably jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant’s favor. See id. at 255.

The moving party has the initial burden to identify evidence that he believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). If this is accomplished, the burden shifts to the nonmoving party to “do more than

simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. Fireman’s Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

III. ANALYSIS

Section 1983 provides civil damages where a person acting under color of state law violates an individual’s rights under the Constitution or the laws of the United States.³

A. Police Officers Liability

(1) False Arrest

To assess the liability of police officers in a civil rights action based on a claim of false arrest, a court must determine whether there was probable cause for the arrest. See Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988). Probable cause exists “when the facts and circumstances within the arresting officer’s knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested.” Orsatti v. New Jersey State Police, 71 F.3d 480, 483 (3d Cir. 1995). Even police officers who reasonably but mistakenly conclude that probable cause is present are

³ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. Section 1983 does not create substantive rights; it only provides a remedy for the deprivation of rights elsewhere established. See Colburn v. Upper Darby Township, 838 F.2d 663, 667 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). In our case, it is undisputed that defendants were acting under color of state law. The alleged constitutional deprivations invoked here are violations of the Fourth and Fourteenth Amendments.

entitled to immunity from false arrest. Hunter v. Bryant, 502 U.S. 224, 227 (1991). It is irrelevant that the arrestee is later exonerated. Michigan v. DeFillippo, 443 U.S. 31, 36 (1979). Consequently, the merit of the Section 1983 claims depend upon the information known to the individual police officers who arrested Mr. Leporace.

Hence, the critical issue now before the Court is the reasonableness of the police officers' belief that Mr. Leporace had committed criminal offenses at the time of the arrest. The evidence shows that police officers Merrick and Lewis responded to a radio call regarding a screaming person and had been informed by some students of a fight at the same location. Upon arrival at the scene, the officers immediately observed a female bleeding from the face and with blood on her shirt. She appeared to be extremely upset.

There are three versions of what transpired next. One version is that the female identified Mr. Leporace as the person who struck her. The second version is that the female said a black man hit her, but Mr. Leporace gave that man a stick. And, the last version is that the police officers asked the female whether Mr. Leporace hit her and she responded affirmatively. Under all of these factual versions, however, I find that the evidence shows that the female identified Mr. Leporace as somehow being involved in striking her. I find that this identification under these circumstances is sufficient to establish probable cause for the arrest.

There is ample evidence that numerous bystanders informed the police officers that Mr. Leporace was not involved in the incident, despite the female's words to the contrary. Mr. Leporace argues that this evidence should negate any probable cause that may have initially existed to arrest him. I disagree. I find that the police officers are not liable even if they investigated the scene negligently or if they did not heed the claims of the many bystanders. See

Orsatti, 71 F.3d at 484. Under the circumstances, the police officers had no reason to believe or disbelieve the claims of the bystanders; no means to assess the credibility of the bystanders or to determine their motives or biases, if any. Moreover, the evidence shows that a crowd was gathering, that traffic was stopped, and that many onlookers were shouting. Given the potentially volatile situation, I cannot say that the police officers did not act reasonably when arresting Mr. Leporace based upon the allegations against Mr. Leporace made by the apparent victim of an assault and informing the witnesses to go to the detectives to explain their accounts.

Although the existence of probable cause is often a factual issue, see Deary v. Three Un-Named Police Officers, 746 F.2d 185, 191-92 (3d Cir. 1984), summary judgment is appropriate here because no reasonable jury could conclude otherwise. I conclude that, as a matter of law, the police officers had probable cause to arrest Mr. Leporace under the circumstances presented.

(2) Excessive Force

In Groman v. Township of Manalapan, 47 F.3d 628, 633-34 (3d Cir. 1995), the Court of Appeals for the Third Circuit restated the components of an excessive force claim. Although "[p]olice officers are privileged to commit a battery pursuant to a lawful arrest," their use of force during an arrest must be objectively reasonable. Id. at 634 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)). The reasonableness of an officer's use of force is a fact-specific inquiry in each case. Id. The district court should inquire into whether the arrested was actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396. The court must also consider "the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of

force necessary in a particular situation.” Id. at 396-97.

In his complaint, Mr. Leporace alleges that the police officers twisted his arms, pulled them behind his back, handcuffed him and threw him against a parked car.” (Amended Complaint at ¶ 21). To defeat the motion for summary judgment on the excessive force claim, Mr. Leporace presents deposition testimony of himself and of Steadman. Mr. Leporace testified that a police officer told him he was under arrest. (Dep. of Leporace at 34). Mr. Leporace said that he told the officer to go with him to the back of the restaurant to meet Steadman and then walked in the back of the store. (Dep. of Leporace at 35, 37). Soon thereafter, a police officer grabbed Mr. Leporace by the hands and forearms. (Dep. of Leporace at 37). The police twisted him and pushed him onto the car and put him on the floor. (Dep. of Leporace at 38). Mr. Leporace fell down, and stopped breathing when placed in a police car with closed windows, and even passed out twice. (Dep. of Leporace at 38, 40-41). Mr. Leporace was then “dumped” into a separate police van. (Dep. of Leporace at 40). Mr. Leporace held his arm stiff when the police officers reached for his arms. (Dep. of Leporace at 50). The officers handcuffed Mr. Leporace behind his back despite his complaints of chest pain and inability to breathe. (Dep. of Leporace at 40).

Steadman stated that five police officers “bum rushed” Mr. Leporace and “grabbed him and wrestled him all up and down the side of my car.” (Statement of Steadman at unnumbered page 6). When he arrived at the detective station, Mr. Leporace was immediately taken to the emergency room of Albert Einstein Medical Center because of his complaint of chest pain, where he was treated and released. (Pl. Ex. I, Police Report at 1). Mr. Leporace also presents medical reports from physicians who saw him later showing that he has suffered from

disc herniation, neck, shoulder and arm pain, and pectoralis strain. One of the physicians opined in March 1997 that Mr. Leporace's poor state of health was due to the injuries he suffered in the arrest on September 27, 1994. (See Pl. Exs. T, U).

Defendants present testimony containing slightly different versions of the events that transpired. While outside the restaurant, Officer Lewis informed Mr. Leporace that Mr. Leporace had to go to the detective's office. (Dep. of Lewis at 48). Officer Lewis then reached for Mr. Leporace's arm, who pulled away. (Dep. of Lewis at 48). Officer Lewis stated that Mr. Leporace said that he would not go with officer Lewis. (Dep. of Lewis at 48-49). Mr. Leporace then walked toward the front of his restaurant. (Dep. of Lewis at 49). Officer Lewis followed Mr. Leporace and explained that it was not voluntary and that Mr. Leporace had to go. (Dep. of Lewis at 49). Mr. Leporace then ran into, through and out the back door of the restaurant and Officer Lewis gave chase. (Dep. of Lewis at 49). Officer Merrick stated that Mr. Leporace ran out the back door of his restaurant and that police officer Lewis came out seconds later. (Dep. of Merrick at 15). Officer Lewis instructed two other police officers to get Mr. Leporace. (Dep. of Merrick at 16). These police officers then grabbed Mr. Leporace and took him toward the police wagon. (Dep. of Merrick at 16).

Even construing the facts in a light most favorable to Mr. Leporace, as I am required to do at this juncture, I conclude that summary judgment is appropriate on the excessive force claim. While there are indeed several gaps in the testimonies as to what took place, there are several material and relevant facts that are not in dispute. It is undisputed that police officer Lewis informed Leporace that Mr. Leporace had to go to the detective's office and that he was under arrest. It is undisputed that Mr. Leporace walked away from the arresting police officer

into and through the back of the restaurant after the police officer informed him that he was under arrest and Mr. Leporace concedes he knew he was under arrest before he walked away. It is also undisputed that Mr. Leporace held his arms “stiff” when the police officers attempted to obtain custody of him. And, as I concluded earlier, the police officers had probable cause to believe Mr. Leporace was involved in a criminal activity.

Thus, I find that, based on all of the above undisputed facts, it was reasonable to believe that Mr. Leporace was resisting or evading arrest, thereby necessitating a certain amount of force to execute the arrest. Resistance does not necessarily have to involve physical or violent conduct; rather, as is the case here, resistance exists by mere noncompliance or by merely offering verbal explanations of why the arrest is inappropriate. Once the police officer informs the arrestee that he is under arrest, anything short of complete acquiescence and cooperation could reasonably be believed by the police officer as a form of resistance. Whether Mr. Leporace was physically resisting arrest when he held his arms “stiff” or merely unable to comply due to shock or distress by the situation, I find that the police officers acted reasonably in using the force necessary to stop, handcuff, and arrest Mr. Leporace. And, the force they used -- grabbing Mr. Leporace, twisting him, pushing him onto the car, and wrestling with him -- I find was reasonable under the circumstances. No reasonable jury could find otherwise without engaging in speculation or relying upon sympathy or bias.

I conclude that the evidentiary record, taken as a whole, shows that Mr. Leporace resisted the police officers’ attempts to effectuate a lawful arrest. I further conclude that, as a matter of law, the police officers employed reasonable, and not excessive, force in response to

effectuate the arrest under the circumstances.⁴ Therefore, having found no disputed issues of material fact, I will grant summary judgment on this claim (Amended Complaint, First Cause of Action, at 18-33).

(3) Qualified Immunity

The police officers additionally argue that they are qualifiedly immune from any claim of excessive force. The success of the qualified immunity defense also turns on the reasonableness of the officers' actions. See Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982) (qualified immunity applies when "conduct does not violate clearly established ... rights of which a reasonable person would have known"). Although I need not reach this issue in light of my previous findings and conclusions, I will say that it is likely that the police officer defendants would have been entitled to qualified immunity on the false arrest and excessive force claims.

B. City of Philadelphia Liability

A local government may be held liable for civil rights violations under Section 1983 only for acts implementing an official policy, practice or custom. Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978). A plaintiff must identify the challenged policy, attribute it to the city itself, and show a causal link between the policy and the injury suffered. Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984).

⁴ Mr. Leporace presents nothing in the record to suggest that the arresting officers knew or should have known that Mr. Leporace was susceptible to injury or to aggravation of any preexisting condition; thus, the officers were not alerted to use other than normal methods to seek compliance with their need to subdue Mr. Leporace. There is no evidence that Mr. Leporace suffered any excessive trauma as he was seen and released at the emergency room that same night. The mere fact that Mr. Leporace's physicians believed that some or all of his muscular and skeletal related problems were caused by or aggravated by the arrest incident is not evidence from which it may be inferred that excessive force was used. At most, the medical reports show (if they could be considered as affidavits contra the motion for summary judgment, which this Court cannot do) that there may be some evidence (possibly developed) that there is some causal relationship between Mr. Leporace's health conditions and the events of the arrest. The reports do not contain any evidence of the extent of the trauma at the time of the arrest, let alone that the forces used were unusually harsh or excessive.

Plaintiffs have adduced no evidence of any policy, practice, custom, regulation or enactment of unconstitutional activity with respect to false arrests and excessive force. In fact, plaintiffs do not brief at all this issue in their response to the motion for summary judgment. Absent any evidence or argument by plaintiffs, I will enter summary judgment in favor of the City of Philadelphia on this issue. Plaintiffs cannot rely on the conclusory allegations of their Amended Complaint to defeat a summary judgment motion. A party may not rely merely upon bare assertions, conclusory allegations, or suspicions. See Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

C. State Law Claims

The remaining claims of plaintiffs are grounded in state law.

Supplemental jurisdiction is a doctrine of discretion, not of plaintiffs' right. Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966)). If the claims over which a district court has original jurisdiction are dismissed, the district court has the option of declining to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). In determining whether to dismiss the state law claims, the district court should consider judicial economy, convenience and fairness to the parties, the stage of the litigation, whether either party will be prejudiced by the dismissal of the state law claims, and whether state law claims involve issues of federal policy. Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993); Glaziers & Glassworkers Local 252 Annuity Fund, et al. v. Newbridge Sec., Inc., 823 F. Supp. 1191, 1197 (E.D. Pa. 1993). In the instant action, because the state law claims for assault and battery, false arrest, false imprisonment, malicious prosecution, intentional infliction

of emotional distress and outrageous conduct are similar to the false arrest and excessive force claims under federal law, the parties have already completed all necessary discovery on this issue, the product of which will be usable in any state court action. Also, no federal policies are implicated by the remaining state law claims. In addition, because Pennsylvania law provides that matters dismissed by a federal court for lack of subject matter jurisdiction may be refiled in the appropriate state court without regard to the limitations period, plaintiffs will not be prejudiced with respect to the applicable limitations period if they choose to refile their lawsuit. See 42 Pa. Cons. Stat. Ann. § 5103(b); Fulkerson v. City of Lancaster, 801 F. Supp. 1476, 1486 n.3 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993). Accordingly, I will dismiss without prejudice the remaining state law claims, including the derivative action of plaintiff Carmella Leporace. (Amended Complaint, Second Cause of Action at 50-53).

III. CONCLUSION

The Court is sympathetic to Mr. Leporace for any significant physical discomfort, inconvenience, and embarrassment he has suffered. However, the law requires the result that I reach here today. So long as law enforcement officials act reasonably under the circumstances, the laws protects their actions, and even their mistakes, especially under potentially dangerous, confused and frenzied situations.

For the foregoing reasons, I will grant the motion for summary judgment on the federal claims. With the remaining state law claims, I will exercise my discretion and dismiss them without prejudice.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PASQUALINO and CARMELLA	:	CIVIL ACTION
LEPORACE, husband and wife,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.,	:	
	:	
Defendants.	:	NO. 96-6363

ORDER

AND NOW, on this 9th day of June, 1998, upon consideration of the motion of defendants City of Philadelphia, and police officers Henry Lewis, David Merrick, and ten unnamed police officers for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) (Document No. 20), and the response of plaintiffs Pasqualino and Carmella Leporace thereto, as well as the pleadings, depositions, affidavits, and admissions on file, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of defendants is **GRANTED** and **SUMMARY JUDGMENT** is hereby entered in favor of the City of Philadelphia, police officers Henry Lewis, David Merrick, and ten unnamed police officers and against Pasqualino Leporace and Carmella Leporace on the false arrest and excessive force claims brought pursuant to 42 U.S.C. § 1983.

IT IS FURTHER ORDERED that the supplemental state law claims are, in the exercise of this Court's discretion, **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. § 1367(c)(3), recognizing the right of plaintiffs Pasqualino and Carmella Leporace to refile this state law claim in the appropriate state court.

This is a final Order.

LOWELL A. REED, JR., J.